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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

* * *

MARY ELIZABETH DEAN, ET AL

PETITIONERS,

V.

COUNTY OF BRAZORIA, TEXAS, ET AL

RESPONDENTS.

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * *

W. Thomas McKissick
Attorney at Law
P. O. Box 36058
Alvin, Texas 77511
(713) 331-0200

Counsel for Petitioners

I.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Will the execution and supervision of unconstitutional acts and policies by the highest ranking officer of the Brazoria County Sheriff's Department on the day in question subject the County of Brazoria, Texas to liability for Petitioners' damages under Title 42 United States Code, Section 1983?

2. Should the County of Brazoria, Texas and the City of Clute, Texas be liable to pay Petitioners' attorneys' fees incurred in the trial and appeal of this case pursuant to the Civil Rights Attorney's Fees Awards Act, 42 United States Code, Section 1988?

3. Should the District Court be required to consider the contingency factor when making an award of attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 United States Code, Section 1988?

II.

PARTIES TO THE PROCEEDING

Petitioners are Ms. Mary Elizabeth Dean, Mrs. Ronald Cowley, Mrs. Frank M. Polk, Jr., and Mr. George W. Hawkins.

Respondents are the County of Brazoria, Texas and the City of Clute, Texas.

Parties to proceedings below, but not to this Petition for Writ of Certiorari, are Robert R. Gladney, Roel G. Saldivar, Leroy Maddox, James Polk, Ronald Boone, the City of Angleton, Texas and the City of Freeport, Texas.

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IN THE

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MARY ELIZABETH DEAN, ET AL

Petitioners

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COUNTY OF BRAZORIA, TEXAS, ET AL

Respondents.

* * *

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

* * *

Petitioners, Mary Elizabeth Dean, et al., respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 24, 1980, with Petitioners timely Motion for Rehearing denied on October 15, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported in 621 F. 2d 1331. The opinion, along with the order overruling Petitioners' Motion for Rehearing is set out in the appendix. The opinion of the District Court is reported in 451 F. Supp. 1313, and is set out in the appendix.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit was entered on July 24, 1980. A timely Petition for Rehearing was denied on October 15, 1980. This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

AUTHORITIES INVOLVED

42 U. S. C. Sec. 1983. Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. Sec. 1988. Proceedings in Vindication of Civil Rights.

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the

common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

On May 11, 1975, an incident took place involving beachgoers and police at Surfside Beach in Brazoria County, Texas. Petitioners were arrested at Surfside Beach and were subsequently incarcerated in the Brazoria County Jail. Petitioners brought this action pursuant to Title 42 United States Code, Section 1983, et seq. and directly under the Fourteenth Amendment to the Constitution of the United States. Jurisdiction was founded on Title 28 of the United States Code, Section 1331 and 1343. Following presentation of the evidence, the case was submitted to a jury. The jury determined that each of the Petitioners were subjected to cruel and unusual punishment by the police officers. The jury found that Petitioners Dean and Cowley were arrested in retaliation for exercising their protected first amendment rights by officers acting with malice, ill will and conscious disregard for their rights. The jury

found that the officers who participated in the illegal activities with reference to Petitioner Hawkins were Brazoria County Deputy Sheriffs Roel Saldivar and Mike Jones, and that Patrolman Leroy Maddox participated in the illegal activities with reference to Petitioner Cowley. The jury answered "unknown" to the question of the officers who participated in the illegal actions with reference to Petitioners Dean and Polk.

In addition to the jury findings, the District Court found that, shortly after the initial arrests, one of the Brazoria County Sheriff's most senior deputies, Deputy Paul Dugan (now deceased) assumed command of all the events that form the basis of this case. Officer Dugan was the officer in charge of the Brazoria County Sheriff's Department on the day in question. The District Court found that there was no evidence that any of the police officers, in committing the tortious acts, turned aside from

their official duties to pursue interest or activities for their own benefit.

The District Court awarded attorneys' fees pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. Sec. 1988, against Officers Saldivar and Maddox, but not against the County of Brazoria or the City of Clute. The District Court held that liability could not be imposed on Brazoria County or the City of Clute, "because of the doctrine of sovereign immunity" and dismissed Petitioners' cause of action against the County of Brazoria and the City of Clute. The District Court held that, because Petitioners' attorneys took the case without expectation of remuneration, the contingency fee factor in determining the amount of the fee award was not applicable.

The United States Court of Appeals for the Fifth Circuit held that, based on an implied cause of action under the Constitution predicated on Bivens v. Six

Unknown Named Federal Narcotics Agents, 403 U.S. 388 (1971), Brazoria County and the City of Clute could not be held liable for Petitioners' damages; that Brazoria County and the City of Clute could not be held liable for Petitioners' attorneys' fees awarded pursuant to the Civil Rights Attorney's Fees Awards Act; and that the District Court's failure to consider the contingency factor in the attorney's fee award was not clearly erroneous.

Petitioners filed a Petition for Rehearing in which Petitioners asserted that the issue of governmental entity liability based on 42 U.S.C. Sec. 1983 was before the Court of Appeals for its consideration and that Brazoria County and the City of Clute should be liable for Petitioners' attorney's fees. The Petition for Rehearing was denied.

Petitioners now file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I.

This case provides the Court with an opportunity to further define the type of conduct, actions and decisions by governmental officials that will subject a governmental entity to liability under Title 42 United States Code, Section 1983.

(A) Governmental Entity Liability Under 42 U. S. C. Section 1983

This Court in Monell v. Department of Social Services of the City of New York, 436 U. S. 658, 690 (1978) stated: "...it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Sec. 1983." In Owen v. City of Independence, Missouri, ____ U. S. ____, 100 S. Ct. 1398 (1980), this Court further defined the requisite criteria to hold a governmental entity liable for constitutional

violations:

> More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it, "Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons d'etre. Owen, 100 S. Ct. at 1418.

In the present case, the District Court found that Deputy Sheriff Dugan, one of Sheriff Gladney's principal assistants and the officer in charge of the Brazoria County Sheriff's Department on the day in question, supervised all of the police activities

that are the bases of this case. Deputy Sheriff Dugan should be considered a decisionmaker who established official policy that violated Petitioners' First and Eighth Amendment rights.

The decision of the Court of Appeals for the Fifth Circuit is in conflict with the Second Circuit case of Turpin v. Mailet, 619 F. 2d 196 (1980). The facts of the present case fall squarely within the criteria for establishing governmental entity liability discussed in Turpin. The court in Turpin considered the question of the type of conduct on the part of municipal employees that can be the basis for municipal liability:

> We must therefore reject at the outset appellant's suggestion that an "official policy" within the meaning of Monell cannot be inferred from informal acts or omissions of supervisory municipal officials. Turpin, 619 F. 2d at 200.
>
> (A) single unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary

> to warrant an inference that it was attributal to inadequate training or supervision amounting to deliberate indifference or "gross negligence" on the part of the officials in charge. Turpin, 619 F. 2d at 202.

(B) The Section 1983 Claim is Appropriate for Review

In the present case, the Court of Appeals stated that Petitioners did not raise their section 1983 claim on appeal. However, the Court of Appeals did rule that the District Court's dismissal of Petitioners' section 1983 claim was correct. The section 1983 claim was before the Court of Appeals for consideration. In the appellate brief, Petitioners submitted the following issue to the Court of Appeals: "Should the County of Brazoria, Texas and the City of Clute, Texas be held liable for damages to plaintiffs for First and Eighth Amendment constitutional violations committed by their employees?" Section 1983 states: "Every person who, under color of... (law)... subjects ... any... person... to the deprivation of any rights, privileges, or immunities secured by

the Constitution and laws, shall be liable to the party injured in an action at law..." In State of Maine v. Thiboutot, ____U. S. ____, 100 S. Ct. 2502, 2504 (1980), this Court stated: "...the sec. 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law." On March 24, 1980, Petitioners submitted to the Court of Appeals a memorandum of law on the issue of governmental entity liability based on the Monell criteria. Additional memoranda were submitted to the Court of Appeals on June 24, 1980 and on July 21, 1980 as additional cases were decided. On March 21, 1980, Appellees below submitted for the first time the question of joint and several liability of the police officers. That issue was considered by the Court of Appeals. Petitioners informed the Court of Appeals of its failure to decide the section 1983 issue in Petitioners' Petition for Rehearing.

This Court is not precluded from ruling on the

issue of governmental entity liability under section 1983. Carlson v. Green, ____U. S. ____, 100 S. Ct. 1468, 1471 n. 2.

II.

The Court of Appeals ruled that the County of Brazoria, Texas and the City of Clute, Texas should not be required to pay Petitioners' attorneys' fees. This is in conflict with the legislative history of the Civil Rights Attorney's Fees Awards Act, decisions of this Court and decisions of the courts of appeal.

(A) The Act and Legislative History

The Civil Rights Attorney's Fees Awards Act (hereinafter, Act), 42 U. S. C. Sec. 1988 (Oct. 1976), provides in pertinent part:

> In any action or proceeding to enforce a provision of (section 1983, inter alia), the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The legislative history of the Act is clear that attorney's fees under the Act may be awarded not

only against state officials in their official capacity but also against the state or local governmental unit for which the official works. The Senate Report on the Act states:

> In such cases it is intended that attorney's fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the state or local government (whether or not the agency or government is a named party). Senate Report No. 1101, 94th Cong. 2nd. Sess., p. 5 (June 29, 1976).

The House Report states:

> The greater resources available to governments provide an ample base from which attorney's fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities. House Report No. 94-1558, 94th Cong. 2nd. Sess., p. 7 (Sept. 15, 1976).

During the debate on the Act in the House, Mr. Fish described the kind of cases to which the Act would apply:

> Without the provision of attorney's fees, it would be very difficult to bring cases such as the following:
>
> Fifth. Suits under section 1981 of the Revised Statutes, which allows action against those having knowledge of a conspiracy to deprive persons of their civil rights and ability to prevent it, yet they do not, as in the case of police officers who witnessed one officer beat the plaintiff and did nothing to prevent it. Symkowski v. Miller, 294 F. Supp. 1214 (D. C. Wis., 1969)). 122 CONG. REC. 12163 (daily ed. October 1, 1976) (remarks of Representative Fish).

(B) Supreme Court Interpretation of the Act

In Hutto v. Finney, 437 U. S. 678 (1978) , a case holding that the Arkansas prison system violated the Eighth and Fourteenth Amendments, the Court stated:

> As this Court made clear in Fitzpatrick v. Bitzer, 427 U. S. 445, Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment. When it passed the Act, Congress undoubtedly intended to exercise that power and to authorize fee awards payable by the States when their officials are sued in their official capacities. The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights

> laws. It contains no hint of an exception for States defending injunction actions; indeed, the Act primarily applies to laws passed specifically to restrain state action. See, e.g., 42 U.S.C. Sec. 1983. Hutto v. Finney, 437 U.S. at 693.

This Court then quoted from the legislative history of the Act which expressly included local governmental units within the scope of the Act. Hutto v. Finney, 437 U.S. at 694.

A number of appellate decisions have held that attorney's fees under the Act are payable by the governmental entity when their officials are sued in their official capacities. Miller v. Carson, 563 F. 2d 741, 754 (1977); Gates v. Collier, 559 F. 2d 241 (1977); Universal Amusements, Inc. v. Hofheinz, 616 F. 2d 202 (1980); McNamara v. Moody, 606 F. 2d 621, 626 (1979); Knighton v. Watkins, 616 F. 2d 795, 799 (1980).

(C) Official Capacity

Petitioners have prevailed against the governmental officials in their official capacity. Congress specifi-

cally addressed official liability for attorney's fees in the Act's legislative history:

> Furthermore, while damages are theoretically available under the statutes covered by (Sec. 1988), it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently, awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. House Report No. 94-1558, 94th Cong. 2nd. Sess., p. 9 (Sept 15, 1976).

See, Entertainment Concepts, Inc. v. Maciejewski, 631 F. 2d 497, 507 (7th Cir. 1980).

The Senate Report states:

> Proof that an official acted in bad faith could also render him liable for fees in his individual capacity, under the traditional bad faith standard recognized by the Supreme Court in Alyeska. See Class v. Norton, 505 F. 2d 123 (2nd. Cir. 1974); Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975). Senate Report No. 1101, 94th Cong. 2nd Sess., p. 5 n. 7 (June 29, 1976).

In Hutto v. Finney, 437 U.S. at 700, the Court stated: "Awards against the official in his individual capacity, in contrast, were not to be affected by the statute..." (42 U.S.C. Sec. 1988).

(D) Discretion of the District Court

The Court of Appeals ruled that the decision of the District Court to hold only the individual Defendants liable for attorneys' fees may be disturbed only if the District Court committed an abuse of discretion. In New York Gaslight Club, Inc. v. Carey, ____U.S. ____, 100 S.Ct. 2024, 2033 (1980), the Court stated: " We also find no merit in petitioners' suggestion that denial of a fee award was within the District Court's discretion. As noted earlier, the court's discretion to deny a fee award to a prevailing plaintiff is narrow. Absent "special circumstances," see Newman v. Piggie Park Enterprises, 390 U.S. at 402; Christiansburg Garment Co. v. E.E.O.C., 434 U.S., at 416-417, fees should be awarded."

Hutto v. Finney, supra, and the legislative history of the Act is clear that governmental entities are responsible to pay the awarded attorneys' fees when plaintiffs prevail against the governmental officials in their official capacity.

(E) Contingency Aspect of Fee Award

The Court of Appeals ruled that the District Court's failure to consider the contingency factor of the attorney's fee determination was not clearly erroneous, citing Fed. R. Civ. P. 52(a) which states that findings of fact shall not be set aside unless clearly erroneous. The contingency factor or aspect of an attorney's fee award is a question of law rather than of fact. The contingency aspect of an attorney's fee award should be considered by the District Court. Northcross v. Board of Education of the Memphis City Schools, 611 F. 2d 624, 638 (1979). Knighton v. Watkins, 616 F. 2d 795, 800 (1980).

CONCLUSION

The County of Brazoria, Texas should be held liable to pay the damages awarded to Petitioners. The County of Brazoria. Texas and the City of Clute, Texas should be held liable to pay Petitioners' attorneys' fees. In the alternative, this case should be remanded to the District Court for reconsideration of its opinion in light of Monell v. Department of Social Services of the City of New York, supra, and Hutto v. Finney, supra. This case should be remanded to the District Court for consideration of the contingency factor of the attorneys' fee award and for determination of Petitioners attorney's fees on appeal.

Respectfully submitted,

W. Thomas McKissick
Attorney at Law
P. O. Box 36058
Alvin, Texas 77511
(713) 331-0200

CERTIFICATE OF SERVICE

I hereby certify that one copy of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon each of the attorneys for Respondents by placing same in the United States mail, certifiec, return receipt requested, addressed to Mr. A. B. Crowther, Jr., Office of the District Attorney, Brazoria County Courthouse, Angleton, Texas, and a second copy addressed to Mr. John McEldowney, Mills, Shirley, McMicken & Eckel, First Hutchings - Sealy National Bank Building, Suite 700, Galveston, Texas.

W. Thomas McKissick

APPENDIX

A-1

451 F.Supp. 1313

MARY ELIZABETH DEAN et al.
Plantiffs,

v.

R. ROBERT GLADNEY et al.
Defendants.

Civ. A. No. 75-G-140.

United States District Court,
S. D. Texas,
Galveston Division.

May 16, 1978.

Arrestees brought action against law enforcement authorities and their employers arising out of alleged tortious acts of officers. After jury returned verdict finding officers liable for misconduct and awarding damages, the District Court, Cowan, J., held that: (1) cities and county were immune from liability for tortious acts of law enforcement authorities; (2) shield of sovereign immunity did not afford protection to sheriff for tortious acts of his deputies; (3) sheriff was not liable for exemplary damages and (4) arrest records

would be expunged.

Order accordingly.

W. Thomas McKissick, Alvin, Tex., Edward L. Sargologos, Houston, Tex., for plaintiffs.

Odgen Bass, Angleton, Tex., for defendants Gladney, Saldivar, Maddox, County of Brazoria and City of Freeport.

William J. Cornelius, Jr., McLeod, Alexander Powel & Apffel, Inc., Galveston, Tex., for defendant City of Angleton.

John S. McEldowney, Mills, Shirley, McMicken & Eckel, Galveston, Tex., for defendant City of Clute.

MEMORANDUM OPINION

COWAN, District Judge.

Factual Background

On May 11, 1975, 30 t0 40 persons who had been enjoying Surfside Beach were arrested and later confined in the Brazoria County jail.

Six plaintiffs contend that they were arrested without probable cause and subjected to cruel and unusual punishment by the arresting officers.

The essential controverted fact issues have been resolved by a jury verdict. In addition, a number of facts, not specifically submitted to the jury for resolution, are established as a matter of law.

The weekend before May 11, 1975, an event occurred which created some apprehension at the Brazoria County Sheriff's Department. On that occasion, Officer Mike Jones, a witness but not a defendant, effected an arrest upon Surfside Beach. While he was driving from the beach, the rear door of his police vehicle was opened by persons on the beach and his prisoner escaped. This event, in addition to other information coming to the Brazoria County Sheriff's Department, made Sheriff Gladney, one

of the defendants herein, and his deputies apprehensive that additional trouble might be expected on May 11, 1975. For that reason, the patrol car normally patroling the beach was occupied by two deputies. In addition, Sheriff Gladney instructed his deputies, in connection with troubles which were contemplated on May 11, 1975, that "unlawful force would be meet with lawful force."

During the afternoon hours, Deputy Sheriffs Roel Saldivar and Mike Jones, who were acting as partners, drove to the beach and observed two men either engaged in an altercation, or attempting to repair the physical damage resulting therefrom. Saldivar and Jones arrested the two individuals, handcuffed them and placed them in the rear of their police vehicle.

After effecting the first two arrests, Deputy Sheriffs Jones and Saldivar did not leave the beach immediately because, accord-

ing to their testimony, a large number of swimmers began to crowd around their police vehicle, creating a situation in which the officers feared that if they placed their prisoners in the back seat and started to drive away, the swimmers would open the back door and allow the prisoners to escape. Therefore, Officers Jones and Saldivar radioed for assistance, which promptly arrived.

Just after the first assistance vehicle arrived on the scene, Brazoria County Deputy Sheriffs arrested George Hawkins, one of the plaintiffs herein. The jury found that Jones and Saldivar had probable cause for Hawkins' arrest. Hawkins was handcuffed, with his hands behind his back and placed in the rear of the Jones-Saldivar patrol car with the two other prisoners.

Shortly after Hawkins' arrest, the officers on the scene began the arrest of a large number

of other people. Within a fairly short period of time, five other men had been arrested, handcuffed and placed along with Hawkins and the two original detainees in the rear of the Jones-Saldivar patrol car.

Within a very short period of time, somewhere between 15 and 20 police vehicles arrived at the scene, along with a "paddy wagon," a van-type vehicle into which prisoners could be placed. Despite the availability of other places to place the prisoners while the disturbance was controlled, Officers Jones and Saldivar left Hawkins and seven other handcuffed individuals in the rear of their police vehicle for approximately one and one-half hours with the windows closed. The temperature was hot. Applying the uncontroverted facts in the light of the jury verdict, the inference may be drawn that the officers at the scene jointly commenced a course of tortious conduct when these seven men were left jammed into the rear of the police

vehicle while the "paddy wagon" and other vehicles were available at the scene.

Ultimately, the Jones-Saldivar patrol car was driven to the Brazoria County jail in Angleton, and Hawkins and seven other individuals were removed from the vehicle and taken into the Brazoria County jail. There is evidence that Hawkins was unable to walk after the confinement in the patrol car and that he was allowed to fall to the pavement while being removed from the patrol car.

Hawkins was ultimately booked, held during the evening hours until he made bond, and finally released. Hawkins was never prosecuted and charges against him were ultimately dismissed.

The jury found that Jones and Saldivar subjected Hawkins to cruel and unusual punishment, and that in doing so, they had not acted in good faith. The jury awarded Hawkins $3,300

in actual damages.

It is established without dispute that shortly after the initial assisting units arrived, Deputy Sheriff Dugan, one of Sheriff Gladney's principal assistants and the Deputy Sheriff in charge of the Sheriff's Department on the day in question, arrived at the beach, took charge of the activities of the various officers on the scene and established a "command post" for the purpose of directing activities.

Plaintiffs introduced evidence that after Hawkins' arrest, Officers Jones, Saldivar and other officers who had arrived to assist them, began indiscriminately arresting numerous citizens, and subjecting the arrestees to unreasonable force such as kicking and striking them with billy-clubs. There was a great dispute about exactly what occurred; but it is undisputed that during the early stages of the disturbance, a vehicle occupied by one of the

plaintiffs, Mrs. Ronald Cowley, her husband Ronald Cowley, and Mrs. Cowley's younger sister Laurie Walker, drove up to the scene of the disturbance. The car in front of the Cowley vehicle stalled, and Mr. Cowley got out of his car to assist the driver of the stalled car. The driver of the stalled vehicle was a relative of the Cowleys.

Mr. and Mrs. Cowley and Laurie Walker all testified that as they sat in the vehicle waiting for Mr. Cowley to assist the stalled vehicle ahead of them, Officer Saldivar (one of the defendants here) walked up to their car, clapping his hand with his billy-club. Laurie Walker and Mrs. Cowley were taking pictures of alleged police brutality. Officer Saldivar leaned into the Cowley vehicle and told Mrs. Cowley and Laurie Walker that if they did not stop taking pictures, he would smash their camera into their heads.

As soon as Mr. Cowley had assisted his relative in starting the car, he pulled his vehicle to the fringes of the disturbance to a beach establishment called the "Sunshine Hut." He parked his car with the purpose of going to the Sunshine Hut to obtain hamburgers. While Mr. and Mrs. Cowley ascended the steps of the Sunshine Hut, Laurie Walker remained in the Cowley vehicle and continued to take pictures. Officer Leroy Maddox and one other unidentified officer came to Laurie Walker, took her camera from her, removed the film, threw the film on to the sand, and threw the camera in the back seat. Thereupon, the officers arrested Laurie Walker and started to escort her toward the police vehicle. Observing these events, Mrs. Cowley ran back to her younger sister, who was 16 years of age at the time, protested her sister's arrest by stating that the girl could not be arrested for taking pictures. The officers in the immediate vicinity stated that they could arrest Ms. Walker for taking pictures,

and in fact if Mrs. Cowley protested, she would be arrested also. She was arrested.

The identity of the officers who arrested Mrs. Cowley cannot be established, but it is clearly inferable that Officer Maddox participated fully in the events of culminating in Mrs. Cowley's arrest and the jury has so found. Officer Maddox was identified definitely as the officer who was arresting Laurie Walker. Officer Maddox was one of the officers whom Mrs. Cowley protested. The jury found, on the basis of adequate evidence, that Mrs. Cowley was arrested in retaliation for her action and that of her sister in taking pictures.

Mrs. Cowley and Laurie Walker were placed into the rear of the police vehicle operated by Officer Maddox and were left there for approximately one to one and a half hours before they, too, were taken to the Brazoria County jail. Officer Maddox' patrol car ultimately came to be

occupied by at least two other women who were apprehended in the manner described below.

During this series of events, another plaintiff, Mrs. Frank (Sharon) Polk, was arrested because she was protesting her husband's arrest. The jury has found that the law enforcement officers who arrested her did not lack probable cause, but that she was subjected to cruel and unusual punishment by the arresting officers.

The jury found that one other female plaintiff, Mary Elizabeth Dean, was subjected to cruel and unusual punishment and that she had been arrested in retaliation for the exercise of her First Amendment rights.

The findings of cruel and unusual punishment with reference to the three women plaintiffs, i.e., Mrs. Frank Polk, Ms. Mary Elizabeth Dean and Mrs. Ronald Cowley, are predicated on the undisputed facts described below.

All four of the women who had been apprehended were placed in the back of the Maddox vehicle, and remained there for approximately one and one-half hours while the officers controlled the disturbance. During this period of time, Mrs. Polk was highly distraught because she was fearful that her five-months old child had been left unattended on the beach. There was no ventilation in the hot police vehicle.

Ultimately, Officer Maddox got into the vehicle and drove it to the Brazoria County jail at excessive rates of speed, approximating 80 miles per hour. Although begged to slow down by the women prisoners, who testified that they were terrified, he refused to do so.

When the Maddox vehicle arrived at the Brazoria County jail, the four women were taken into the jail and placed into a small cell with approximately 20 male prisoners. Sheriff Gladney has testified forthrightly that it is "unthink-

able" to place female prisoners with male prisoners.

At the time these four women were placed in a cell with 20 male prisoners, a number of the male prisoners were laying on the floor groaning because of their injuries. Some were urinating on the wall. The women requested permission to go to the bathroom and were told by the jailors, who were Brazoria County Deputy Sheriffs, that they could go ahead and urinate with the men.

After a period of time, the four women were removed from the cell in which they had initially been placed, and put in a janitor's closet, again with no bathroom facilities. Untimately they were searched by a police matron who told them that they had a choice of paying the $27.50 fine or pleading not guilty and posting a bond of $300.00

Mary Elizabeth Dean

Mary Elizabeth Dean was a passenger in a vehicle with two other persons. During the disturbance she was waiting upon a ramp leading up the fishing pier while her two friends were inside obtaining a hamburger. She was observing the activities of the officers, was upset and was crying. She was approached by an unidentified officer who told her that she would be required to leave the beach. She told the officer that she was with two other people who were inside, that she was not driving and that she could not leave until her two friends returned. The officer turned around and started to leave, at which time, Ms. Dean, with her left hand, silently gave the officer a military salute. Apparently perceiving that this had been done, the unidentified officer turned around, arrested Ms. Dean and put her in the Maddox vehicle along with the other women prisoners. Untimately, Ms. Dean was taken to the Brazoria County jail by Maddox and subjected

to the same treatment as the other three women.

Jury Findings

The jury has made the following pertinent findings of fact:

1. The Brazoria County Deputy Sheriffs did not lack probable cause for arresting George Hawkins.
2. The Brazoria County Deputy Sheriffs did not use greater force than necessary in securing Hawkins' arrest and detention.
3. The Brazoria County Deputy Sheriffs did not delay for an unreasonable period of time before taking Hawkins before a magistrate.
4. The Brazoria County Deputy Sheriffs did subject Hawkins to cruel and unusual punishment.
5. The officers who participated in the illegal activities with reference to Hawkins were Brazoria County Deputy

Sheriffs Roel Saldivar and Mike Jones.

6. The officers who participated in Hawkins' arrest and detention did not act in good faith.

7. $3,300 would reasonably compensate Hawkins for the pain, suffering and mental anguish directly and proximately resulting from the illegal action of defendants.

8. Deputies Saldivar and Jones did act with good faith in connection with the arrest of Hawkins, but not in connection with his detention.

9. The law enforcement officers who participated in Mrs. Frank (Sharon) Polk's arrest did not lack probable cause for her arrest.

10. The officers who arrested Sharon Polk did not use greater force than necessary to secure her arrest and detention.

11. The law enforcement officers who participated in Sharon Polk's arrest and

detention did not delay for an unreasonable time before taking her before a magistrate.

12. The law enforecement officers who participated in Sharon Polk's arrest and detention did subject her to cruel and unusual punishment.

13. The law enforcement officers who actually arrested Sharon Polk or participated in the illegal actions with reference to her were not known.

14. The officers who participated in Sharon Polk's arrest and detention did not act in good faith.

15. The sum of $1,000 would fairly and reasonably compensate Sharon Polk for the pain and mental anguish directly and proximately resulting from her illegal arrest and detention.

16. Mary Elizabeth Dean was arrested in retaliation for exercising her protected First Amendment rights.

17. Mary Elizabeth Dean would not have been arrested if she had not exercised her protected First Amendment rights.

18. The officers who arrested Mary Elizabeth Dean did not lack probable cause for arresting her.

19. The officers who detained Mary Elizabeth Dean did subject her to cruel and unusual punishment.

20. The sum of $2,600 would fairly and reasonably compensate Mary Elizabeth Dean for the pain, suffering and mental anguish directly and proximately resulting from her arrest and detention.

21. The officers who participated in Mary Elizabeth Dean's arrest did act with malice, ill will and conscious disregard of her rights and that $1,000 should be awarded her as punitive or exemplary damages.

22. Mrs. Ronald Cowley was arrested in retaliation for her action, or that of her

younger sister, in taking photographs.

23. Mrs. Cowley would not have been arrested if she and her younger sister had not exercised their rights, as protected by the First Amendment, to take pictures.

24. The officers who arrested Mrs. Cowley did lack probable cause.

25. Mrs. Cowley was subjected to cruel and unusual punishment.

26. Patrolman Leroy Maddox did participate in the illegal activities with reference to Mrs. Cowley.

27. The sum of $4,000 would fairly and reasonably compensate Mrs. Cowley for the pain, suffering and mental anguish directly and proximately caused by her arrest and detention.

28. The officers who arrested Mrs. Cowley did act with malice, ill will and with conscious disregard of her rights.

29. The sum of $1,000 in exemplary or punitive damages should be awarded to Mrs. Cowley.

In addition to the facts established by the jury findings, the Court finds that a number of facts are established, as a matter of law, as follows:

1. Shortly after the initial arrests, one of Sheriff Gladney's most senior deputies, Deputy Paul Dugan (now deceased) arrived, assumed overall command of the activities at the scene, established a "command post" and thereafter exercised effective control over the various officers of various municipalities and agencies which came to the scene of this disturbance.
2. Some time after the commencement of the disturbance and substantially before the police vehichles left the scene to go to the Brazoria County jail, a "paddy wagon" or van-type vehicle arrived at the scene. In addition, there were approximately 15 to 20 additional police vehicles at the scene. Despite this, Officers Jones and Saldivar, under the direct supervision of

their supervisor Dugan, placed Hawkins and seven other individuals, some or all of whom had their hands handcuffed behind their backs, in the rear of the Jones-Saldivar police vehicle where they needlessly suffered intense discomfort and danger of serious physical injury.

3. At all times after Deputy Dugan arrived at the scene and assumed command of the activities at the disturbance, he became a joint tort-feasor with any officer committing a wrong of which Dugan knew, or should have known.

4. Officer Leroy Maddox knowingly participated in the wrongful activities with reference to Mary Elizabeth Dean, Mrs. Ronald Cowley and Mrs. Frank Polk because he actively participated in the arrest of Mrs. Cowley, drove the vehicle which took Mrs. Cowley, Mrs. Polk and Ms. Dean to the Brazoria County jail, and delivered them the jail where they were subjected to the

additional abuse which the jury has found to constitute cruel and unusual punishment. In this connection, Brazoria County jail at all material times, was under the command and direction of deputies of the Brazoria County Sheriff's Department who had complete control over the activities which occurred in the Brazoria County jail on the day in question. Accordingly, it has been established, as a matter of law, that Mrs. Cowley, Mrs. Polk and Ms. Dean were damaged by the combined activities of joint tort-feasors, including Officers Maddox and Saldivar, Chief Deputy Paul Dugan, and other deputies of the Brazoria County Sheriff's Department in charge of the jail.

5. Officers Roel Saldivar and Leroy Maddox participated actively in the events whereby the plaintiffs were subjected to unlawful police activity and could have easily foreseen that their unlawful acti-

vitiy would aggravate the disturbance on Surfside Beach and result in the deprivation of the constitutional rights of all the plaintiffs. Saldivar and Maddox were, as a matter of law, joint tortfeasors with any other officers who at the time and on the occasion in question participated in wrongful activity with reference to the plaintiffs.

6. Sheriff Robert Gladney had no knowledge of the activities of his deputies either at the scene of the arrests or at the jail. He was apparently off duty that day and all of the activities were supervised by Deputy Dugan (now deceased). Dugan's estate was not a party to this suit at the time of trial. There is no evidence that Sheriff Gladney was negligent in the selection of his deputies. There is no evidence that Sheriff Gladney has any personal knowledge of the events at the jail on Sunday afternoon or that any of

the established procedures at the jail were responsible for the treatment of the plaintiffs. There is no evidence that Sheriff Gladney personally ratified the acts of his deputies.

7. A number of officers participated in the events in question as joint tort-feasors. Defendants Maddox and Saldivar were, as a matter of law in the light of the jury verdict, joint tort-feasors whose torts proximately caused the damages to plaintiffs Polk, Cowley and Dean.

LEGAL ISSUES RAISED BY FACTS AND PENDING MOTIONS

The legal issues presently before the Court may be summarized as follows:

1. May liability be imposed upon defendants Brazoria County, the City of Freeport, the City of Angleton, or the City of Clute?
2. May liability be imposed upon Sheriff Gladney for the acts of his deputies?

3. Should liability be imposed upon Officer Maddox for damages attributable to Mrs. Cowley?

4. May examplary damages be assessed against Sheriff Gladney?

5. Should the arrest records with reference to Mrs. Cowley and Mary Elizabeth Dean, both of whom have been found to have been arrested illegally, be expunged?

6. Should the Court award attorneys fees to plaintiffs' counsel?

7. May liability properly be predicated on the findings relating to cruel and unusual punishment?

I

LIABILITY OF COUNTIES AND MUNICIPALITIES

Liability cannot be imposed upon the City of Freeport, the City of Clute, the City of Angleton, or upon Brazoria County because of the doctrine of sovereign immunity.

The foundation of the plaintiffs' claim is

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) and 42 U.S.C. § 1983. Bivens establishes a cause of action against an individual officer if the federal officer violated the plaintiff's constitutional rights and such violation is a proximate cause of damages. Review of the concurring and dissenting opinions, however, reveals that Bivens leaves intact the doctrine of soverign immunity. Justice Harlan in his concurring opinion at 403 U.S. 410, 91 S.Ct. 2012 says:

> . . .However desirable a direct remedy against the Government might be as a substitute for individual official liability the sovereign still remains immune to suit . . .

Chief Justice Burger dissented, stating that the remedy against the individual officer was inadequate, and that Congress should, by legislation, establish a cause of action directly against the government. Chief Justice Burger said:

> . . . In any event, an actual recovery de-

> pends on finding non-exempt assets of the police officer from which a judgment can be satisfied.
>
> I conclude, therefore, that an entirely different remedy is necessary, but it is one that in my view is as much beyond judicial power as the step the court takes today. Congress should develop an administrative, or quasi-judicial remedy against government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. . . .

In Moor v. County of Alameda, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), a deputy sheriff in quelling a civil disturbance discharged a shotgun, injuring the plaintiff. Defendants were the deputy sheriff who discharged the shotgun, three other deputies, the sheriff himself, and the County of Alameda. Justice Marshall discussed in detail the legislative history relating to 42 U.S.C. § 1983, in which Congress displayed a clear intent to refrain from enacting legislation allowing the imposition of liability upon governmental entities for officer's misconduct.

The immunity of the governmental entities is

also established in Little v. Schafer, 319 F.Supp. 190 (S.D.Tex.1970); Burnett v. City of Houston, 442 S.W.2d 919 (Tex.Civ.App.--Houston, 1969); U.S. v. Faneca, 332 F.2d 872 (5th Cir. 1964); and Archer v. Cisco, 211 S.W. 2d 955 (Tex.Civ.App.--Eastland, 1948).

II

LIABILITY OF SHERIFF GLADNEY

The shield of sovereign immunity affords no protection to Sheriff Gladney. Arguably, the law, both statutory and common law, makes Sheriff Gladney legally responsible for the acts of his deputies.

Art. 6870, Tex.Rev.Civ.Stat., states:

> Sheriffs shall be responsible for the official acts of their deputies, and they shall have power to require from their deputies bond and security; and they shall have the same remedies against their deputies and sureties as any person can have against a sheriff and his sureties.

The cases construing and discussing Art. 6870 have pointed out that it merely incorporates into the Texas statutes the common law. An early case enunciating the rule which arguably

governs this case as to Sheriff Gladney's liability is Bracken v. Cato, Tex., 54 F.2d 457, at 458, where the court said:

> . . . The sheriff is the keeper of the jail of his county, and may appoint one of his deputies jailer. Article 5116. He is responsible for the official acts of his deputies. Article 6870. So far as the public is concerned, there is no difference between the official acts of the sheriff and those of his deputies. Heye & Co. v. Moody, 67 Tex. 615, 4 S.W. 242; Rogers v. The Marshall, 1 Wall. 644, 17 L.Ed. 714. See, also, note in 1 ALR 222, 236. As it was the official duty of Ramsay as deputy sheriff and jailer to keep all prisoners safely, it follows necessarily that it was a breach of that official duty and an abuse of his authority to injure or kill a prisoner without justifiable cause or legal excuse. 'The character of the act, whether official or not, does not depend upon its lawfulness, but upon the fact that the person who performs it is in fact an officer and purports to act in his official capacity and does act by virtue of authority conferred by law.' King v. Brown, 100 Tex. 109, 94 S.W. 328, 330. See also, Myers v. Colquitt (Tex.Civ.App.) 173 S.W. 933 (933). According to the undisputed evidence, Ramsay killed Bracken without justification or excuse. . . .

The arguable liability of Sheriff Gladney is also predicated upon Rich v. Graybar Electric Co., 125 Tex. 470, 84 S.W.2d 708 (Tex.Comm.App. 1935-Opinion adopted), by Justice Marshall's opinion in Moor v. County of Alameda, 411 U.S. 693, 93

S.Ct. 1785, 36 L.Ed.2d 596, and particularly by the cases cited favorably by Justice Marshall in footnote 17 of the Moor opinion, i.e, Lewis v. Brautigam, 277 F.2d 124, 128 (5th Cir. 1955) and Hesselgesser v. Reilly, 440 F.2d 901 (9th Cir. 1971). Tex.Atty.Gen.Ops. M-990 and H-751.

In the case at bar it was established as a matter of law that the Sheriff's Department expected difficulty on Surfside Beach. Sheriff Gladney had instructed his deputies to "meet unlawful force with lawful force." While the various deputies involved, under the findings of the jury, committed tortious acts, there is no evidence that any of them, in committing such tortious acts, turned aside from their official duties to pursue interests or activities for their own benefit. For this reason, cases such as City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965) are not applicable.

As indicated above, it is established as a matter of law that one of Sheriff Gladney's

principal and senior deputies, Deputy Sheriff Dugan arrived at the scene of the disturbance shortly after its inception, established a command post, and thereafter exercised supervisory control over all of the officers who arrived at and participated in the activities at the scene. In addition, it is established as a matter of law, that Sheriff Gladney's deputies were in charge of the jail.

Although a respectable argument may be formulated for the imposition of liability upon Sheriff Gladney, the more recent cases of the Fifth Circuit Court of Appeals and the Texas Supreme Court seem to establish the rule that a sheriff may be held liable for the brutality and mistakes of his deputies only if the sheriff knew of and participated in the torts, ratified the tortious conduct or if, as in Whirl, infra, the tortious conduct had persisted for such an extended period that the sheriff is, factually or legally, charged with knowledge. See Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969); Workman

v. Freeman, 155 Tex. 474, 289 S.W.2d 910 (Supp.Ct.1956).

Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), holds that all officers who particpate in an illegal arrest and detention are jointly and severally liable as joint tort feasors if they participated in any of the actions in connection with the illegal arrest and detention.

III

Applying the Nesmith case, it is apparent that Officers Maddox, Dugan and all of the Brazoria County deputies who participated in the activities at the jail and who supervised the activities at the jail were joint tort feasors. It is established by the jury verdict and the facts found as a matter of law that certain of Sheriff Gladney's deputies were joint tort-feasors with reference to the three women plaintiffs. This case, however, provides no authority for the imposition of liability upon Sheriff Gladney.

LIABILITY PREDICATED UPON FINDINGS
OF CRUEL AND UNUSUAL PUNISHMENT

It may be forcefully argued that Ingram v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) precludes imposition of liability based upon the jury findings of cruel and unusual punishment. Justice Powell, speaking for the majority there, said:

> . . . An examination of the Amendment (i.e., the Eight Amendment) and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes. We adhere to this longstanding limitation. . . .

IV

97 S.Ct. 1401, at 1409.

It would, however, be anomalous to hold that the State may impose summary punishment upon those merely accused of offenses which it could not constitutionally impose upon those convicted of offenses. The jury findings may be construed to support a conclusion that the deputy sheriffs here engaged in the conduct condemned not merely carlessly, but for the express purpose of punish-

ing the plaintiffs summarily and this Court so construes the jury findings.

V

LIABILITY OF SHERIFF GLADNEY FOR EXEMPLARY DAMAGES

While it is arguable that Sheriff Gladney is legally responsible for the acts of his deputies, the only Texas authority clearly reveals that he is not liable for exemplary damages. See Taylor v. Stanford, 229 S.W.2d 427 (Tex.Civ.App.--Galveston 1950).

VI

ATTORNEYS FEES

There are here no exceptional circumstances which would warrant the denial of attorneys fees in the action under 42 U.S.C. § 1988 (1976). See Senate Report No. 94-1011, 94th Congress, 2nd Session, page 4 (June 29, 1976), U.S.Code Cong. & Admin. News 1976, p. 5908; House Report No. 94-1558, 94th Congress, 2nd Session, pages 4-6 (September 15, 1976); therefore, all this Court need do is compute a reasonable fee.

The factors pertinent to the determination of an adequate award are set forth in Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977) and are as follows:

(1) the time and labor required,

(2) the skill requisite to properly perform the legal services,

(3) preclusion of other employment by the attorney due to acceptance of the case,

(4) the novelty and difficulty of the questions presented,

(5) the customary fee,

(6) whether the fee is fixed or contingent,

(7) time limitations imposed by the client,

(8) the amount involved and the results obtained,

(9) the experience, reputation and ability of the attorneys,

(10) the undesirability of the case,

(11) the nature and length of the professional relationship with the client,

(12) awards in similar cases.

In this regard the Court has read the affidavits and briefs submitted in this cause and listened to testimony and arguments from both

sides. The criteria contained in Rainey will be discussed in order.

(1) The time and labor required for the preparation and completion of this case have been asserted in affidavit form by attorneys W. Thomas McKissick and Edward L. Sargologos. Mr. McKissick states that he expended 27 hours in trial, two hours in post trial hearings and 255 hours in other related matters including 50 hours travel time, for a total of 284 hours. Mr. Sargologos also spent 27 hours in trial and 64 in preparing for trial. The estimated trial time seems to the Court conservative and the estimates of preparation time reasonable.

The failure of the attorneys to keep accurate time records is a hindrance to the Court, but it has been established that the attorneys took this case on a pro bono basis before passage of the Attorneys Fees Act by Congress, thus partially explaining their failure to keep records. For the purposes of this award, Mr. McKissick will be designated as lead counsel.

Although the amounts of time may have been inflated due to duplication of effort or because of the inefficiency of these admittedly inexperienced trial counsel, the Court concludes that these figures are reasonably accurate particularly when considered in the light of the long term of pendency of this action and the voluminous filings involved. In addition, some duplication of effort and misdirected effort is normal even in cases handled by experienced counsel.

(2) This case required the skills of an average trial lawyer. There were a multitude of legal and factual issues to be sorted out and analyzed. There were a large number of witnesses to be interviewed, selected, and presented at trial. The case also needed an attorney who could present a sensitive case involving law enforcement authorities to the jurors without antagonizing them.

(3) The very relevant factor in this award

of attorneys fees is the situation of Mr. McKissick and his present and possible preclusion from other employment due to his acceptanc of this case. Mr. McKissick has demonstrated considerable courage by taking this case against a popular and wellknown sheriff in the locale in which he is attempting to establish his practice. The potentially adverse economic impact of this case on Mr. McKissick's practice is a very real and significant factor.

(4) As evidenced by the complexities of the charge to the jury, this case contained many difficult issues. A multitude of constitutional and state law questions were presented. The questions were not particularly novel, however, and were definitely not issues of first impression requiring pioneering research or analysis.

(5) Mr. James Bradford, President of the Brazoria County Bar Association, testified on

April7, 1978, that the customary fee charged in the area where this suit was tried is $50.00 per hour for both pretrial and trial work. Plaintiffs' attorneys seek compensation of $75.00 for trial time and $50.00 for pretrial work. It is the opinion of the Court that a customary fee is difficult to ascertain in litigation of this sort but that Mr. Bradford's opinion should be given significant credibility. In Johnson v. Georgia Highway Express, Inc, 488 F.2d 714 (5th Cir. 1974), the Court stated that fee scales would vary but that at no time should the fee drop below the $20.00 established by the Criminal Justice Act.

(6) As stated previously, both attorneys asserted that they took this case without expectation of renumeration. Accordingly, the factor of whether the fee is contingent or fixed is not applicable.

(7) The time limitations factor is also not applicable.

(8) The plantiffs recovered a verdict awarding over ten thousand dollars from law enforcement authorities. In addition, important constitutional rights have been redressed. These results are significant and given considerable weight by the Court.

(9) In all candor, however, plaintiffs probably would have experienced some difficulty in retaining experienced, busy, seasoned counsel to handle this litigation. The plaintiffs' attorneys are both young and in the early stages of building their practice. Neither of them has prepared more than a small number of cases for trial prior to the instant action. The inexperience of counsel weighs heavily in this determination of fees.

(10) The fact of the undesirability of this case is apparent. It particularly affects Mr. McKissick, as already discussed in the "preclusion" section of this discussion. Often the decision to take a case of this nature is not

pleasantly received by the community, and there is a high potential for public disfavor. Therefore, this case's undesirability is an important factor.

(11) The length of the professional relationship with client is not relevant here.

(12) The awards in similar cases provide vague guidelines as to reasonableness. In Cruz v. Beto, 453 F.Supp. 905 (S.D.Tex. 1977), Judge Carol O. Bue awarded attorneys fees ranging from $35.00 to $90.00 per hour. The higher fees went to extremely well qualified counsel in a case which is somewhat analogous to this action. These rates are considered by this Court to be advisory only.

VII

Therefore, on the basis of the affidavits of counsel, the evidence introduced on April 7, the Court's independent observations and the guidelines set forth above, the Court concludes

that plaintiffs are entitled to an attorneys' fee computed as follows:

	McKissick	Sargologos
Trial and post trial time	29 x $40	27 x $30
Pretrial work	205 x $25	52 x $20
Travel	50 x $ 5	12 x $ 5
Total	$6,535	$1,910

VIII

EXPUNGEMENT OF ARREST RECORDS

Plaintiffs Dean and Cowley have requested the expungement of their arrest records arising out of the incident occurring on May 11, 1975. The Court is well aware that there are only narrow instances when expungement can be regarded as a proper remedy. However, the jury specifically found that both Dean and Cowley had been arrested in retaliation for exercising their constitutional rights, that they would not have been arrested had they not exercised their constitutional rights, and that the arresting officers lacked probable cause in the arrest of Dean and Cowley. Accordingly, expungement affords appropriate relief. Menard v. Saxbe,

162 U.S.App.D.C. 284, 498 F.2d 1117 (1974) and United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

CONCLUSION

For the reasons stated above, the Court has concluded that judgment should be entered for Hawkins against Saldivar and for Sharon Polk, Mrs. Ronald Cowley and Mary Elizabeth Dean against Saldivar and Maddox in the amounts found by the jury. A judgment of even date herewith is being contemporaneously executed.

621 F.2d 1331

MARY ELIZABETH DEAN et al.,
Plaintiffs-Appellants Cross-Appellees,

v.

ROBERT R. GLADNEY et al.,
Defendants-Appellees,

ROEL G. SALDIVAR AND LEROY MADDOX,
Defendants-Appellees
Cross-Appellants.

No. 78-2632.

United States Court of Appeals,
Fifth Circuit.

July 24, 1980.

Arrestees brought civil rights suit against county, cities and law enforcement officers for unlawful arrests and for the imposition of cruel and unusual punishment. The United States District Court for the Southern District of Texas, Finis E. Cowan, J., 451 F.Supp. 1313, dismissed the county and cities from the suit and rendered judgement on a jury verdict for the arrestees against two law enforcement officers. Appeals were taken. The Court of Appeals, Gee, Circuit Judge, held that: (1)

the district court could not impose liability on the county or the municipalities for the acts of their employees on the arrestees' implied cause of action under the Constitution; (2) attorney's fees could not be awarded against the city and county; (3) the district court's failure to consider the contingency fee factor in determining the amount of the award of attorney's fees was not clearly erroneous; and (4) the two officers were not jointly and severally liable to all the arrestees where the injuries to the various arrestees were in no sense indivisible, but could be apportioned with reasonable certainty to one officer or the other.

Affirmed in part, reversed in part and remanded.

Appeals from the United States District Court for the Southern District of Texas.

Before JONES, GEE and Reavley, Circuit Judges.

GEE, Circuit Judge:

On May 11, 1975, a confrontation erupted between beachgoers and police at Surfside Beach near Freeport, in Brazoria County, Texas. Numerous persons, including the appellants,[1] were arrested and jailed on charges of disorderly conduct or public intoxication by a large force of police officers summoned to quell the disturbance. As a result of this incident, various plaintiffs, including appellants, brought the instant lawsuit, predicated on the first, fourt, eight and fourteenth amendments and 42 U.S.C. §§ 1981 et seq., against the law enforcement officers involved in the arrests, plus Brazoria County Sheriff Robert Gladney and his deputy, Paul Dugan,[2] Brazoria County, and the Cities of Angleton, Clute and Freeport, Texas. Present appellees

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[1]Present appellants include Mary Elizabeth Dean, Mrs. Ronald Cowley, Mrs. Frank M. Polk, Jr., and George W. Hawkins.

[2]Dugan died prior to trial, and his estate was not a party to this suit at the time of trial.

in this appeal consist of Brazoria County, Sheriff Gladney, former Brazoria County Deputy Sheriff Roel Saldivar, former Clute Police Officer Leroy Maddox, and the City of Clute.

We begin by briefly reciting the facts as set forth in the district court's memorandum opinion, 451 F.Supp. 1313 (D.C.Tex. 1978). On the weekend prior to the incident resulting in this lawsuit, Brazoria County Deputy Sheriff Mike Jones effected an arrest at Surfside Beach. As he and his prisoner were leaving the area, persons on the beach opened the rear door of the police vehicle and allowed the prisoner to escape. This incident made Sheriff Gladney and the members of his department apprehensive that more trouble might occur the following weekend. As a precaution, Sheriff Gladney assigned two deputies, rather than one, to the police vehicle that patrolled the beach. In addition, he instructed his deputies that, should any further trouble arise, "unlawful force would be met with lawful force."

During the afternoon hours of May 11, Deputies Saldivar and Jones observed two men involved in an altercation. They arrested and handcuffed both men and placed them in the rear of the police vehicle. Following these arrests, large numbers of swimmers began to crowd around the vehicle, prompting the officers, fearful of another confrontation, to radio for assistance, which promptly arrived.

Shortly after the arrival of the first assistance vehicle, appellant Hawkins was arrested, handcuffed and placed in the back of the Saldivar-Jones vehicle with the two other prisoners. Other arrests followed within a short period of time. Despite the arrival of some 15 to 20 additional police vehicles and a "paddy wagon," Deputies Jones and Saldivar placed five additional handcuffed prisoners in the back seat of the vehicle with Hawkins and the the two others, leaving the eight there for approximately one and one-half hours in stifling heat with the windows closed. When

Hawkins was finally taken to the Brazoria County Jail in Angleton, he was unable to walk and was allowed to fall to the pavement while being removed from the police vehicle. He was booked and held during the evening hours until bond was made, and then released. Hawkins was never prosecuted, and the charges against him were ultimately dismissed.

After Hawkins' arrest, Jones and Saldivar and others who had been sent to assist them began indiscriminately arresting numerous citizens and subjecting the arrestees to unreasonable force by kicking them and striking them with billy clubs. During the early stages of this disturbance, a vehicle occupied by appellant Cowley, her husband, and her younger sister Laurie Walker, drove up to the scene. The car in front of theirs stalled and Mr. Cowley went to assist. While Ms. Walker and Mrs. Cowley waited in their vehicle, Saldivar walked up to the car, clapping his hand with a billy club. Both women were taking pictures of the alleged

brutality. Saldivar leaned into the vehicle and informed them that if they did not stop taking pictures he would "smash the camera into their heads." Mr. Cowley returned to his vehicle and drove to a food stand on the fringe of the disturbance. While the Cowleys purchased food, Ms. Walker remained in the car taking pictures. As this point Officer Maddox and an unidentified officer approached the Cowley vehicle, took the camera away from Ms. Walker, removed and disposed of the film, and placed Ms. Walker under arrest. Observing these events, Mrs. Cowley ran back towards her sixteen-year-old sister to protest Ms. Walker's arrest, whereupon Mrs. Cowley, too, was arrested.

During this series of events, appellant Polk was arrested for protesting her husband's arrest.

Appellant Dean was a passenger in a vehicle carrying two other persons. She was waiting by a fishing pier for her friends. As she watched the disturbance, she became upset and began

crying, An unidentified officer approached her and told her to leave the beach. She informed him that she could not leave until her two friends returned. As the officer turned to leave, Ms. Dean affected a silent military salute. Apparently perceiving this gesture, the officer arrested her.

All four women were placed in Officer Maddox' unventilated patrol car, where they were left for approximately one and one-half hours in the hot sun. During this period Mrs. Polk became distraught because she feared that her five-month-old baby had been left unattended on the beach. Over the women's protests, Maddox ultimately drove them to the Brazoria County Jail at excessive rates of speed. Upon arrival at the jail, the four women were placed in a small cell with approximately twenty male prisoners, some of whom were lying on the floor groaning from their injuries; some were urinating on the wall. When the women asked to use a bathroom, the jailers, who were Brazoria County

deputy sheriffs, told them that they could urinate with the men. The women were later removed from the cell and placed in a janitor's closed, which also had no bathroom facilities. They were then searched by a police matron, who informed them that they could either pay a $27.50 fine or plead "not guilty" and post a bond of $300.00.

Subsequently, appellants and other arrestees brought this lawsuit. Following the presentation of evidence, the case was submitted to the jury. With respect to appellant Hawkins, the jury found that probable cause existed for his arrest, which was made without illegal force, but that Saldivar and Jones,[3] acting without good faith, had subjected him to cruel and unusual punishment; accordingly, it awarded him compensatory damages of $3,300. Regarding

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[3]Deputy Jones was a witness at trial, but was not made a defendant in this suit.

Appellant Polk, the jury found that probable cause existed for her arrest, which was made without illegal force, but that unknown officers acting without good faith, had subjected her to cruel and unusual punishment, necessitating an award of compensatory damages in the amount of $1,000. The jury found that appllant Dean had been arrested without probable cause, in retaliation for exercising her protected first amendment rights, by unknown officers acting with "malice, ill will and conscious disregard of her rights," and had been subjected to cruel and unusual punishment. It awarded her compensatory damages of $2,600 for her injuries and punitive damages of $1,000. Finally, the jury determined that appellant Cowley had been arrested by Officer Maddox without probable cause in retaliation for her exercise of protected first amendment rights, and subjected to cruel and unusual punishment, meriting compensatory damages of $4,000 and punitive damages of $1,000.

In addition to those facts established by the jury findings, the district court found, as a matter of law, that Officer Maddox and Deputy Saldivar were, "in light of the jury verdict, joint tort-feasors whose torts proximately caused the damages to plaintiffs Polk, Cowley and Dean."[4] Accordingly, the court entered judgments in the amounts of $1,000, $3,600 and $4,000 in favor of appellants Polk, Dean and Cowley, respectively, against appellees Saldivar and Maddox.[5] The Court further determined that there was no evidence that

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[4]The Court also found that Deputy Dugan, who was a principal assistant of Sheriff Gladney and the officer in charge of the police activities on the beach on the afternoon of May 11, other unknown police officers who participated in the activities relating to appellants, and the Brazoria County deputy sheriffs who were in charge of the jail that afternoon were, as a matter of law, joint tort-feasors with Saldivar and Maddox.

[5]The Court also awarded appellant Cowley $1,000 in exemplary damages against Officer Maddox alone. With respect to appellant Hawkins, the district court entered judgment in his favor in the amount of $3,000 in damages against Saldivar alone. These awards are not at issue on appeal.

Sheriff Gladney was negligent in the selection of his deputies, that he had any personal knowledge of the events at the jail on the afternoon of May 11, or that he personally ratified the acts of his deputies that day.[6] Thus, the court dismissed the cause of action against Sheriff Gladney with prejudice.[7] Moreover, the district court held that liability could not be imposed on Brazoria County or the Cities of Angleton, Clute, and Freeport, Texas, "because of the doctrine of sovereign immunity" and therefore dismissed plaintiffs' cause of action against those entities with

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[6]The Court also found that there was no evidence to show that any of the established procedures at the trial were responsible for the treatment of the plaintiffs.

[7]The dismissal of the cause of action against Sheriff Gladney has not been appealed. We note, however, that on the facts as found by the district court, dismissal was proper. See Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979).

prejudice. Finally,[8] after considering the factors set forth in Rainey v. Jackson State College, 551 F. 2d 672 (5th Cir. 1977), the district court awarded appellants' counsel attorney fees totaling $8,445[9] against appellees Saldivar and Maddox.

Following the denial of Saldivar's and Maddox' motion for a new trial, appellants filed a notion of appeal, alleging essentially three grounds of error: (1) failure to hold the county and the municipalities liable for damages to plaintiffs for first and eight amendment violations commited by their employees; (2) failure to impose liability upon the county and municipalities for attorneys' fees

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[8]Only those aspects of the district court's memorandum opinion and final judgment that are relevant to this appeal are discussed in our opinion. We neither recount nor discuss other facets of the action below.

[9]Of that sum, $6,535 was awarded to appellants' lead counsel, W. Thomas McKissick, and $1,910 to appellants' co-counsel, Edward L. Sargologos.

incurred by appellants in the trial and appeal of the instant case pursuant to the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988; and (3) failure to consider whether the attorneys' fees were fixed or contingent as required by Rainey, Supra, in determining the amount of attorneys' fees awarded against Deputy Saldivar and Officer Maddox pursuant to section 1988. Saldivar cross appeals, charging that the district court erred in holding him jointly and severally liable with Officer Maddox for the damages awarded appellants Polk, Dean and Cowley. We consider the appellants' and cross-appellants' contentions seriatim.

I

RESPONDEAT SUPERIOR LIABILITY

The district court held that it could not impose liability on the county or the municipalities for the acts of their employees on appellants' implied cause of action under the

Constitution, predicated on Bivens v. Six Unknown Named Federal Narcotics Agents,[10] or on their section 1983 claim "because of the doctrine of sovereign immunity." Only the Bivens claim is before us on appeal.[11] The district court correctly noted that "Bivens establishes a cause of action against an individual federal officer if the federal officer violated the plaintiff's constitutional rights and such violation is a proximate cause of damages." He observed, however, that "Bivens

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[10] 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

[11] Although appellants do not raise their § 1983 claim on appeal, we note that Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), decided by the Supreme Court after the district court's opinion, controls this claim. In Monell the Supreme Court held that "a municipality cannot be held liable under § 1983 on a respondeat superior theory." ID. at 691, 98 S.Ct. at 2036. Thus, the district court's dismissal of appellants' § 1983 claim was correct.

leaves intact the doctrine of sovereign immunity."[12] We agree with the district court that Bivens does not sanction the imposition of, and should not be read to impose, respondeat superior liability on a municipality or a county for the acts of its employees. Our conclusion here gains support from the reasoning of decisions in six of our sister circuts that have considered the question before us. See Jones v. City of Memphis, 586 F.2d 622 (6th Cir. 1978), cert. denied, 440 U.S. 914, 99 S.Ct. 1230, 59 L.Ed.2d 464 (1979): Cale v.

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[12] In particular, the district court relied on Mr. Justice Harlan's statement in concurrence that "(h)owever desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 403 U.S. at 410, 91 S.Ct. at 2011-2012 (Harlan, J., concurring). The Court also quoted extensively from Chief Justice Burger's dissent, which concluded that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated. The venerable doctrine of respondeat superior in our tort law provides and entirely appropriate conceptual basis for this remedy." ID at 422, 91 S.Ct. at 2017 (Burger, C.J., dissenting).

City of Covington, 59 F.2d 311 (4th Cir., 1978); Turpin v. Mailet, 579 F.2d 152 (2nd Cir.) (en banc): Nix v. Sweeney, 573 F.2d 998 (8th Cir. 1978): Jamison v. McCurrie, 565 F.2d 37 (1st Cir., 1977). But see Dellums v. Powell, 566 F.2d 216 (D.C. Cir. 1977), cert. denied, 438 U.S. 916, 98 S.Ct. 3147, 57 L.Ed.2d 1161 (1978).

In Bivens the Supreme Court permitted individuals whose fourth amendment rights had been violated by federal agents to bring a claim for monetary damages against those agents directly under the fourth amendment. Respondeat superior liability was not an issue in Bivens; consequently the majority opinion did not broach the subject. Nothing in Bivens, as we read it, supports the imposition of respondeat superior liability. In fact, as the district court below noted, both the concurring and dissenting opinions in Bivens clearly indicate that the doctrine of sovereign immunity precluded the plaintiffs in Bivens from recovering against the government for the tortious conduct of its

agents, even though such recovery might be desirable as a matter of policy. See n.12, supra. Because Bivens imposed liability only on those actors who were culpable, "to impose liability on a municipality under the theory of respondeat superior would be 'fundamentally inconsistent with the import of Bivens.'" Jones v. City of Memphis, 586, F.2d at 625 (quoting Turpin v. Mailet, 579 F.2d at 166: "Since the sine qua non of Bivens is the imposition of liability upon those actors who can meaningfully be termed 'culpable,' it is inappropriate to permit a recovery of damages from those who, by any standard, are innocent of wrongdoing."). We agree with the First Circut that, while respondeat superior liability might be sound as a matter of policy, "the Court's methodology (in Bivens) belies any clain that Bivens should be understood as recognizing sweeping federal judicial power to create damages remedies to vindicate constitutional rights." Kostka v. Hogg, 560 F.2d at 42.

Matters of fiscal policy also counsel against extending Bivens to include suits based upon respondeat superior liability. In establishing a direct cause of action against federal agents for their own tortious conduct, the Supreme Court in Bivens was not confronted with a question of federal fiscal policy. See Bivens, 403 U.S. at 396, 91 S.Ct. at 2004. In contrast, however, where a suit is brought against a county or municipality based on the principle of respondeat superior, state and local fiscal policies are implicated, since the only source for the satisfaction of a judgment against either of those entities is the taxpaying public. See Cale v. City of Covington, 586 F.2d at 317; Nix v. Sweeney, 573 F.2d at 1003 (the Court balanced "the uncertain benefits of the respondeat superior doctrine against the certain encroachment on limited local government revenues").

We are also persuaded by the Supreme Court's opinion in Monell v. Department of Social

Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), that we ought not hold a municipality or county liable in a Bivens-type action on the principal of respondeat superior. In Monell, the Supreme Court held that local governing bodies could "be sued directly under section 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." ID. at 690, 98 S.Ct. at 2036. However, the Court concluded that "a municipality cannot be held liable under section 1983 on a respondeat superior theory." ID. at 691, 98 S.Ct. at 2036 (emphasis in original). We are in accord with the Sixth Circuit's holding that "(i)t would be incongruous to hold that the doctrine of respondeat superior can be invoked against a municipal corporation in an action under 28 U.S.C. § 1331 (a Bivens-type action) where

the doctrine has no application in an action under 42 U.S.C. § 1983." Jones v. City of Memphis, 586 F.2d at 625. Prior to Bivens, Congress had not created a cause of action for intentional violations of constitutional rights by federal officers, although it had created such a remedy in section 1983 against officials and employees acting "under color of state law." The effect of Bivens was, in essence, to create a remedy against federal officers, acting under color of federal law, that was analogous to the section 1983 action against state officials. Denying respondeat superior liability in an implied cause of action under the Constitution is therefore consistent with the rejection of such liability in the context of section 1983.[13] To impose liability

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(Please see footnote 13 on following page.)

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[13]As the Second Circuit noted in Turpin v. Mailet, 579 F.2d at 167:

> In rejecting respondeat superior, we have created a harmonious legislative and judicial scheme for the enforcement of the fourteenth amendment, and thereby adhere to the teaching of Cort v. Ash, 422 U.S. 66, 78, 95, S.Ct. 2080, 45 L.Ed.2d 26 (1975), that implied remedies must, in nature and scope, be "inconsistent" with the legislative enactments already governing an area.

Turpin was vacated by the Supreme Court and remanded for reconsideration in light of Monell. See City of West Haven v. Turpin, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978. It is thus of no binding force and effect, and we cite it only for its reasoning, recognizing that the respondeat superior issue was not reached on remand. See Turpin v. Mailet, 591 F.2d 426 (2nd Cir. 1979) (en banc).

on the basis of respondeat superior in a Bivens-type action against a local governmental would, in effect, permit appellants to circumvent the restrictions imposed in Monell on a section 1983 claim.[14] Although the standards

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(Please see footnote 14 on following page.)

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[14] In the recent case of Heath, Inc. v. Department of Public Welfare, 617 F.2d 381 (5th Cir. 1980) (per curiam), we considered the relationship between a Bivens-type action and a claim under § 1983:

> Although there have been a few notable exceptions, see e.g. Davis v. Passman, 422 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979): Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 402 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), the federal courts, and this Circuit in particular, have been hesitant to find causes of action arising directly from the Constitution. Our reluctance stems from many concerns, not the least of which is our awareness that the framers of the Constitution saw fit to entrust the job of legislating to the Congress. The results in Bivens and Passman were necessitated primarily by the absence of alternative remedies. In each case, there simply was no other means of seeking redress for flagrant violations of the plaintiff's constitutional rights. With respect to the instant case, we note that Congress has provided a means of seeking relief against state officials who violate the Constitution. In pertinent part, 42 U.S.C.A. § 1983 states that any person, acting under color of state law, who deprives a United States citizen "of any rights, privileges, or immunities secured by the Constitution" shall be liable to such citizen.

ID. at 382-83. Plaintiffs there had failed to bring a § 1983 claim, and there was no reason to assume that a § 1983 claim would have been unavailing to them; hence, we affirmed the district court's dismissal of plaintiffs' implied

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(Please see footnote 14 cont. on following page.)

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cause of action. In the instant case, however, appellants did bring a § 1983 claim, based on respondeat superior, which is effectively foreclosed by Monell. Thus it is at least arguable that a Bivens-type action is appropriate here even though it was not in Heath.

of liability under section 1983 are not necessarily applicable to constitutional claims in a Bivens-type action, we are reluctant to extend the scope of municipal liability in the face of the Supreme Court's clear pronouncement in Monell and in the absence of affirmation action by Congress to imposs respondeat superior liability on municipalities in either context.[15]

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[15]We are aware that several commentators have written in support of imposing respondeat superior liability in a Bivens-type action. See Note, Damage Remedies Against Municipalities for Constitutional Violations, 89 Harv. L.Rev.922 (1976); Hundt, Suing Municipalities Directly under the Fourteenth Amendment, 70 Nw.U.L.Rev. 770, 780-82 (1975); Note, A Federal Cause of Action Against a Municipality for Fourth Amendment Violations by its Agents, 42 Geo.Wash.L.Rev. 850, 853, 861 (1974). Each of these articles suggests that Bivens does not preclude respondeat superior liability; in fact, each argues that the imposition of such liability would further the interest served in Bivens. See also Comment, Section 1983 Municipal Liability and the Doctrine of Respondeat Superior, 46 U.Chi.L.Rev. 935, 952 n. 79 (1979). We also recognize that the absence of respondeat superior liability will foreclose some victims of police misconduct from their only

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(Please see Footnote 15 cont. on following page.)

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effective opportunity to actually secure monetary compensation for their damages; they will be forced to seek recovery against individual law enforcement officers, who are likely to be penurious, instead of a county or municipality with its "deep pocket." Nevertheless, we refrain from extending liability to a county or municipality on the basis of respondeat superior in a Bivens-type action. We are convinced that such action, if it is to be taken, is more properly left to the Congress or the Supreme Court.

For all of the above reasons, we affirm the district court's dismissal of appellants' cause of action against Brazoria County and the City of Clute.

II

ATTORNEYS" FEES AGAINST THE CITY AND COUNTY

Appellants also seek to have attorneys' fees assessed against the City of Clute and Brazoria County, at both the trial and the appellate levels.

The Civil Rights Attorney's Fees Awards Act of 1976, as codified at 42 U.S.C. § 1988, permits the district court, in its discretion, to award attorneys' fees to a "prevailing party" as part of the costs of the suit in actions brought pursuant to 42 U.S.C. § 1981, 1982, 1983, 1985, or 1986, if the case was pending at the time that the Act became law. See Escamilla v. Santos, 591 F.2d 1086, 1088 (5th Cir. 1979): Morrow v. Dillard, 580 F.2d 1284, 1297-1300 (5th Cir. 1978). The eleventh

amendment is no longer a bar to such an award. See Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Morrow v. Dillard, 580 F.2d at 1298-1300.

The district court awarded appellants attorneys' fees against Saldivar and Maddox, individually, but refused to assess any fees against Brazoria County or the City of Clute. Its judgment may be overturned only if it has committed an abuse of discretion. Id. at 1300. Appellants have cited no authority for the proposition that attorneys' fees may be awarded against parties properly dismissed from the action merely because they were "prevailing parties" with respect to other parties in the suit. Indeed, an award against Brazoria County and the City of Clute under the circumstances of this case would turn the meaning of "prevailing party" on its head, since the district court expressly found, as a matter of law, that neither entity was liable to the appellants. The failure to award attorneys' fees

against Brazoria County and the City of Clute was proper.[16]

III

THE CONTINGENCY FEE FACTOR

Appellants next complain of the district court's failure to consider the contingency fee factor in determining the amound to be awarded as attorneys' fees. The district court, in its opinion, set forth a step-by-step analysis of all the factors to be considered in such a determination as required by Johnson v. Georgia Highway Express, Inc. 488 F.2d 714 (5th Cir. 1974). See also Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977). With respect to the contingency fee factor, the court found: "As stated previously, both attorneys asserted that they took this case without expectation of remuneration. Accordingly, the factor of whether the fee is

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[16]To the extent that cross appellants Saldivar and Maddox attack the attorneys' fee award against them, no abuse of discretion has been shown.

contingent or fixed is not applicable." Appellants do not assert that this finding is clearly erroneous under Fed.R.Civ.P. 52(a); instead, they point out that attorneys' fees have been requested from the beginning of the lawsuit, which was prior to the passage of the Civil Rights Attorney's Fees Awards Act of 1976. They assert no prejudice that they have suffered as a result of the district court's "oversight."

Consideration of all the Johnson factors is mandatory. See Norwood v. Harrison, 581 F.2d 518, 520 (5th Cir. 1978). However, the district court did consider all of the Johnson factors but found that circumstances rendered the contingency fee factor inapplicable. Because this finding has not been shown to be clearly erroneous, there is no reversible error here.

VI

JOINT AND SEVERAL LIABILITY

In his cross appeal, Deputy Saldivar complains about the trial judge's finding, as a matter of

law, that he was a joint tortfeasor with Officer Maddox and is therefore liable to appellants Dean, Polk, and Cowley for the full amount of their damages. In light of the factual findings made below and the case law precedents to which we have been cited, we reverse the finding of joint liability. Accordingly, we remand this case to the district court for an allocation of the burden of appellants' attorneys' fees between Saldivar and Maddox.

In its opinion the district court characterized Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), as holding that "all officers who participate in an illegal arrest and detention are jointly and severally liable as joint tort feasors if they participated in any of the actions in connection with the illegal arrest and detention." In our view, Nesmith, cannot be read so broadly. In that case we noted that the three police officer defendants had acted as one:

> Although there was no prior plan devised to bring about the arrest and imprison-

> ment of the plaintiffs, each one of the three had a substantial role in bringing about the results. This was an instance of the typical "chain of command." Sullivan indicating to Ruppenthal that the Plaintiffs should be removed from the cafe, Ruppenthal giving the authoritative commands constituting the arrest, and Alford providing the essential transportation at the direction of Ruppenthal. Their actions throughout the whole sequence of events are so intertwined and interlocking that these Defendants must fall together.

Id. at 119. In the instant case the actions of Deputy Saldivar and Officer Maddox cannot be viewed as a "chain of command"; nor were their actions so "intertwined and interlocking" that liability cannot be apportioned between them. The jury made specific findings with respect to the arrest and detention of each of the appellants,[17] and the judge made additional

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[17] See pp. 7712-7713, supra.

findings concerning Officer Maddox' involvement.[18] These findings indicate that Officer Maddox was at least in part responsible[19] for the damages suffered by appellants Dean, Polk, and Cowley.[20] He may thus be held liable for the damages these appellants suffered. On the

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[18]The judge found that:

> Officer Leroy Maddox knowingly participated in the wrongful activities with reference to Mary Elizabeth Dean, Mrs. Ronald Cowley and Mrs. Frank Polk because he actively participated in the arrest of Mrs. Cowley, drove the vehicle which took Mrs. Cowley, Mrs. Polk, and Ms. Dean to the Brazoria County jail, and delivered them to the jail where they were subjected to the additional abuse which the jury has found to constitute cruel and unusual punishment.

[19]We are of course aware that other unidentified officers were implicated in the arrest and detention of appellants Dean and Polk. However, the liability of Officer Maddox for their actions are not before us on appeal. Officer Maddox' liability for the damages of these appellants is unaffected by our decision today.

[20]In a single sentence in the appellees' brief, Saldivar and Maddox appear to contest the sufficiency of the evidence to support certain of the jury's factual findings. After reviewing the record, we find the evidence sufficient to support the jury's determinations.

other hand, there is no evidence whatsoever linking Deputy Saldivar to the arrest or detention of any appellant other than George Hawkins, for whose damages Deputy Saldivar admits liability. To hold Saldivar liable for Officer Maddox' actions without any indication that he was involved in those actions would subject a police officer involved in a group arrest or confrontation to an intolerable burden--liability for any unconstitutional act committed by any one of his colleagues, regardless of his own lack of participation in those acts. Certainly, there are instances, such as the "chain of command" situation in Nesmith, in which imposing liability for anothers actions is appropriate, but the instant case is not one of them.

Plaintiffs' counsel refer us to several cases that, they assert, support the imposition of joint and several liability in the instant case. The principal case cited is Landers v. East Texas Salt Water Disposal Co.,

151 Tex. 251, 248 S.W.2d 731 (1952), which established the theory of "indivisible injury":

> Where the tortious acts of two or more wrongdoers join to produce an indivisible injury, that is, an injury which from its nature cannot be apportioned with reasonable certainty to the individual wrongdoers all of the wrongdoers will be held jointly and severally liable for the entire damages and the injured party may proceed to judgment against any one separately or against all in one suit.

Id. at 734. See also Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076 (5th Cir. 1973); Bristol-Myers Co. v. Gonzales, 548 S.W.2d 416, (Tex.Civ.App.--Corpus Christi 1976) ("The general rule of contribution is that when two or more persons concur in producing a single indivisible injury, then such persons are jointly and severally liable although no common duty, common design, or concerted action exists."), rev'd on other grounds, 561, S.W.2d 801 (Tex.1978). In our view, however, the "indivisible injury" theory is inapposite here, because the injuries to the various appellants are in no sense indivisible. Instead, they are personal, individual, and discrete. Moreover,

each can be apportioned with reasonable certainty to either Saldivar or Maddox, as our discussion above makes clear. We thus conclude that the district court erred in finding as a matter of law that Saldivar was a joint tortfeasor and reverse the district court's judgment that Saldivar is jointly and severally liable for the damages of appellants Dean, Polk and Cowley.

V

Having reversed Saldivar's liability to these appellants, we remand the issue of attorneys' fees to the district court for reconsideration. The court awarded plaintiffs' attorneys fees in the amount of $8,445 against Saldivar and Maddox jointly. In light of our finding that Saldivar and Maddox are not joint tortfeasors, we believe the district court should apportion the amounts of attorneys' fees owed to appellants by each of the officers.

CONCLUSION

In sum, we affirm the district court's dismissal of appellants' claims against Brazoria County and the City of Clute; we find no abuse of discretion in the court's failure to award appellants attorneys' fees against the county and the city or in its handling of the contingency fee factor; we reverse its finding that Saldivar was a joint tortfeasor with Maddox; and we remand the issue of attorneys' fees for reconsideration.

AFFIRMED in part and REVERSED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 78-2632

MARY ELIZABETH DEAN, ET AL.,

Plaintiffs-Appellants,
Cross-Appellees,

versus

ROBERT R. GLADNEYT, ET AL.

Defendants-Appelles,

ROEL G. SALDIVAR and
LEROY MADDOX

Defendants-Appellees,
Cross-Appellants.

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Appeals from the United States District Court
for the Southern District of Texas

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ON PETITION FOR REHEARING

(October 15, 1980)

Before JONES, GEE and REAVLEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARY ELIZABETH DEAN, ET AL
Petitioners,

v.

COUNTY OF BRAZORIA, TEXAS, ET AL
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN S. MCELDOWNEY
MILLS, SHIRLEY, MCMICKEN & ECKEL
700 First Hutchings-Sealy National Bank Building
Galveston, Texas 77550
(713) 763-2341
Counsel for Respondent

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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NO. _____

IN THE

Supreme Court of the United States

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MARY ELIZABETH DEAN, ET AL
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v.

COUNTY OF BRAZORIA, TEXAS, ET AL
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent opposes the petition for writ of certiorari on the following ground:

THE DECISION IS OBVIOUSLY CORRECT AND INVOLVES NO CONFLICT OF OPINION OR OTHER BASIS FOR REVIEW BY THIS COURT.

ARGUMENT

Petitioner no longer seeks damages from the City of Clute because of the actions of its police officer, Leroy Maddox. Petitioner seeks only the recovery of attorneys' fees as against the City of Clute pursuant to 42 U.S.C. § 1988. Petitioner now recognizes in his questions for review by this Court that the District Court and Fifth Circuit Court of Appeals were correct in finding that, as a matter of law, the City of Clute was not liable to any of the Petitioners. Consequently, none of the Petitioners are "prevailing parties" with regard to the City of Clute and therefore not entitled to attorneys' fees.

In addition, to allow the coffers of the City of Clute, Texas, to be responsible for the attorneys' fees assessed in this case, when it has been determined that the City is not liable to the Petitioners, would be contrary to the decision in *Monell v. Department of Social Services of the City of New York, et al,* 98 S.Ct. 2018, in that it would allow a recovery against the City when the City's only exposure would be pursuant to the doctrine of *respondeat superior.*

In none of the cases cited by Petitioner were the attorneys' fees assessed in a situation where the only liability of the governmental entity was based on the doctrine of *respondeat superior.* Consequently, to allow attorneys' fees to be assessed in this situation would violate the Eleventh Amendment and would abolish the doctrine of sovereign immunity.

With regard to the assessment of attorneys' fees and the method used by the District Court in determining same, there has been no showing that the judicial action

of the District Court was arbitrary, fanciful, or unreasonable, or that the Trial Court abused its discretion in any way. Rather, the record is clear that the Trial Court followed the analysis as required by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir., 1974).

CONCLUSION

The decision of the Trial Court and the Fifth Court of Civil Appeals is obviously correct and no error can be found in either Court's opinion in denying Petitioners the right to recover attorneys' fees against the City of Clute, Texas, or considering the various elements involved therein; consequently, the petition for certiorari should be denied.

Respectfully submitted,

JOHN S. MCELDOWNEY
MILLS, SHIRLEY, MCMICKEN
& ECKEL
700 First Hutchings-Sealy
National Bank Building
Galveston, Texas 77550
(713) 763-2341

Attorneys for Respondent,
The City of Clute, Texas